Office-Supreme Court, U.S.
FILED
JAN 21 1981
ALEXANDER L. STEVAS,
CLERK

80-1235

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM A. DOBROVIR
(Attorney of Record)
FRED C. ZACHARIAS
DOBROVIR, OAKES & GEBHARDT
1025 Vermont Avenue, N.W.
Suite 1105
Washington, D.C. 20005
(202) 347-8118
Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

QUESTION PRESENTED

Does the doctrine of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), forbid a state court with in rem jurisdiction in a civil action from enjoining in personam federal court litigation that might affect the state litigation but that would not require the federal court to act in rem or seek custody or control of the res?

TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Summary 3

State Court Proceedings 4

Federal Court Proceedings Below 7

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 17

APPENDIX A – Initial Decision of the Court of Appeals for the Fifth Circuit 1a

APPENDIX B – Decision of the Court of Appeals for the Fifth Circuit Upon Petition for Rehearing *en banc*. 6a

APPENDIX C – Decision of the District Court for the Southern District of Texas 9a

TABLE OF AUTHORITIES

Cases:

Akin v. La. National Bank of Baton Rouge, 322 F.2d 749 (5th Cir. 1963) 9

Allmon v. Bookout, Civ. No. 74-377-N (M.D. Ala.) . . 5, 10, 11

Blackhawk Heating & Plumbing Co., Inc., v. Geeslin, 530 F.2d 154 (7th Cir. 1976) 13

Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co., 600 F.2d 671 (7th Cir. 1979). 12, 13, 15

Commonwealth Trust Co. of Pittsburgh v. Bradford, 297 U.S. 613 (1929) 8

Donovan v. City of Dallas, 377 U.S. 408 (1964) 3, 7, 8, 9, 11, 15, 16

Dragstrem v. Obermeyer, 549 F.2d 20 (7th Cir. 1977) 9

Cases, continued: Page

Fischer v. American United Life Insurance Co., 314 U.S. 549 (1942) 8

General Atomic Co. v. Felter, 434 U.S. 12 (1977) 10, 11, 16

General Atomic Co. v. Felter, 436 U.S. 493 (1978) 10

In Re Primus, 436 U.S. 412 (1978) 15

Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042, *reh. denied*, 419 U.S. 1132 (1975) 9

Koller v. Richmond Industrial Loan & Thrift, 407 F. Supp. 1211 (E.D. Va. 1975) 9

Lightsey v. Kensington Mortgage & Finance Corp., 315 So.2d 431 (Ala. 1975) 6

Markham v. Allen, 326 U.S. 490 (1946) 8, 10

Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448 (W.D. Va. 1975) 8, 13, 14, 15

Monogram Industries, Inc. v. Zellen, 467 F. Supp. 122 (D. Mass. 1979) 8

Moody v. State ex rel. Payne, 329 So.2d 73 (Ala. 1976). 5

Moody v. State ex rel. Payne, 351 So.2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) 15

Moody v. State ex rel. Payne, 355 So.2d 1116 (Ala.), *cert. denied*, 439 U.S. 910 (1978) 6, 15

Morris v. Jones, 329 U.S. 545 (1947) 8

Payne v. Hook, 74 U.S. (7 Wall.) 425 (1968) 16

Penn General Casualty Co. v. Pennsylvania ex rel. Schnader, 294 U.S. 189 (1935) 10

Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939) 7, 8, 9-10, 11

Pufahl v. Park's Estate, 299 U.S. 217 (1936) 8

Cases, continued: Page

Railway Co. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871) 16

Slotkin v. Brookdale Hospital Center, 357 F. Supp. 705 (S.D.N.Y. 1972) 8, 14, 15

State ex rel. Payne v. Empire Life Insurance Co. of America, 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) 6, 15

Tampa Phospate R. Co. v. Seaboard Coast Line R. Co., 418 F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) 11

Tcherepnin v. Franz, 475 F. Supp. 92 (N.D. Ill. 1979) 13

Terral v. Burke Construction Co., 257 U.S. 529 (1922) 16

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 16

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909) 8

Weisfeld v. Spartans Industries, Inc., 58 F.R.D. 570 (S.D.N.Y. 1972) 9

Constitution, Statutes and Rules:

Constitution:

Article VI, clause 2 2

First Amendment 2, 15

Fourteenth Amendment 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 7

Fed. R. App. P. Rule 43 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

SHEARN MOODY, JR.,

Petitioner,

v.

THARPE FORRESSTER, COMMISSIONER OF INSURANCE OF THE STATE OF ALABAMA, AS RECEIVER FOR EMPIRE LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

SHEARN MOODY, JR.,

Petitioner,

v.

PROTECTIVE LIFE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Shearn Moody, Jr., hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these two consolidated cases.*

---

*The caption of the case in this Court contains the names of all parties.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit on appeal (July 3, 1980) and on petition for rehearing *en banc* (December 15, 1980) are reproduced as Appendices A and B respectively. The opinion of the United States District Court for the Southern District of Texas (November 13, 1978) is reproduced as Appendix C. The initial opinion of the Court of Appeals is reported at 620 F.2d 548.

JURISDICTION

The second decision of the Court of Appeals, letting stand its decision of July 3, 1980, affirming the District Court's grant of summary judgment for respondents, was entered on December 15, 1980. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Cl. 2:

This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

First Amendment:

Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Fourteenth Amendment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Summary

Petitioner seeks review of a decision of the Fifth Circuit affirming a decision of the United States District Court for the Southern District of Texas. The Fifth Circuit accepted the validity of an injunction issued by an Alabama state court, enforcing a state court judgment against petitioner and in favor of two other civil parties: the statutory receiver of an insurance company and another insurance company. The judgment was for nearly a quarter of a million dollars. It was based on petitioner's participation (by providing and paying the fees of counsel for plaintiffs) in an in personam federal court civil rights and constitutional action against the receiver and the other insurance company, among others. The Alabama state court had ruled that petitioner's participation in the federal court action violated an injunction against such litigation that the federal court defendants had obtained from the state court.

1. The Fifth Circuit's decision violates the doctrine of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), its predecessors and its progeny, that forbids state courts from interfering with federal in personam litigation.

2. The Fifth Circuit's decision is contrary to and in conflict with decisions of the Seventh Circuit and district courts in the Fourth and Second Circuits that follow the *Donovan* rule.

3. By accepting the state court injunction and acting as collection agent for this extraordinarily harsh sanction imposed on petitioner for exercising rights guaranteed by the First Amendment, the Fifth Circuit's decision virtually disembowels *Donovan*. It invites state courts wholesale to foreclose federal court inquiry into violations of

federal statutory and constitutional rights in entire classes of cases exempt until now from state court interference.

State Court Proceedings

Petitioner, a Texas resident, is the principal stockholder and former president of the Empire Life Insurance Company of America ("Empire Life"), an Alabama insurance company doing business in interstate commerce. On June 29, 1972, the Circuit Court for Jefferson County, Alabama, placed Empire Life in receivership.[1]

Petitioner moved for leave to intervene in the receivership proceedings on a limited basis. After initially denying the motion, the circuit court permitted petitioner to intervene on January 8, 1974. That same day the receiver asked the court to order that Empire Life be liquidated and its policies reinsured by respondent Protective Life Insurance Co. ("Protective"), a competitor of Empire Life. On June 14, 1974, the court appointed respondent Protective as reinsurer.

Petitioner sought redress in the courts to challenge those actions. On January 6, 1975, at the receiver's instance, the circuit court enjoined petitioner from "filing, financing, sponsoring, initiating, or aiding in whole or in part, in any way the filing of any lawsuit, complaint or legal claim, or any amendment to any complaint or legal claim in any court . . . on behalf of any

---

[1]The receiver was the Alabama Commissioner of Insurance. Successor commissioners have succeeded as receivers; there have been at least four during the pendency of this litigation. They will be referred to throughout this petition collectively, as the "receiver." Respondent Foresster was substituted for the receiver named as appellee in the Fifth Circuit's opinions, H. H. Sumrall, pursuant to Fed. R. App. P. Rule 43, prior to the decision denying rehearing *en banc*.

party" against the receiver, the receivership, or with respect to any claim affecting the affairs of Empire Life or the receivership without first obtaining the court's permission. The Alabama Supreme Court affirmed the injunction. *Moody v. State ex rel. Payne,* 329 So.2d 73 (Ala. 1976).

Prior to issuance of the injunction, however, an Empire Life policy-holder, Willie Allmon, a citizen and resident of Arkansas, had filed a lawsuit against the receiver in the federal district court for the Middle District of Alabama. *Allmon v. Bookout,* Civ. No. 74-377-N (M.D. Ala). The suit alleged impairment of the cash value of Allmon's policy. Petitioner had assisted Allmon by providing him with counsel at petitioner's expense. On January 28, 1975, Allmon, through the counsel petitioner provided, filed an amended complaint in the federal court action. The amended complaint framed a class action on behalf of Empire Life policyholders. It alleged that the receivership proceedings were tainted by corruption and by a conspiracy among the officials involved in the case. It claimed that the conspiracy and the proceedings themselves violated the civil rights of the class. It alleged the unconstitutionality of various new Alabama statutes providing for receivership of insurance companies.

The receiver and Protective immediately asked the Jefferson County Circuit Court to adjudge the filing of the amended complaint in *Allmon* a violation of its injunction against petitioner and to hold petitioner in contempt. On April 30, 1975, the Jefferson County court, asserting personal jurisdiction over the absent petitioner on the basis only of his earlier intervention, held him in civil contempt. In June 1976 the court issued an order requiring petitioner to appear and purge himself of the contempt. He did not appear. In August Protective

asked the court to hold petitioner in criminal contempt.[2]

On July 19, 1976, the receiver and on August 19, 1976, respondent Protective filed petitions seeking compensatory and exemplary damages from petitioner for violating the injunction. These petitions were based on a peculiar Alabama procedure, first approved only shortly before in *Lightsey v. Kensington Mortgage & Finance Corp.*, 315 So.2d 431 (Ala. 1975). Under the *Lightsey* procedure private parties may recover damages (called in *Lightsey* a "fine") based on a finding of contempt against the target of an injunction without filing a separate action against the target. Petitioner challenged the Jefferson County court's jurisdiction over him for the damage claims, but the court found jurisdiction based on petitioner's limited participation in the prior receivership proceedings, held petitioner in default when he declined further to participate and entered judgment. As modified on appeal, Protective was awarded $165,228.50 and the Receiver was awarded $68,115.78, in compensatory and punitive damages and for attorney's fees. *Moody v. State ex el. Payne,* 355 So.2d 116 (Ala.), *cert. denied,* 439 U.S. 910 (1978).

---

[2]On September 13, 1976, petitioner was tried *in absentia* on the criminal contempt charge and adjudged in criminal contempt. The court sentenced petitioner to 20 days in jail and fines totalling $200. *See* State ex rel. Payne v. Empire Life Insurance Co. of America, 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978). Never having subjected himself to the jurisdiction of the Alabama courts except on a limited basis in the receivership proceedings, petitioner has neither served the jail sentence nor paid the fine.

Federal Court Proceedings Below

On April 21, 1978, respondents filed a civil action in the District Court for the Southern District of Texas to enforce the Alabama money judgments. Jurisdiction was founded on diversity of citizenship, 28 U.S.C. §1332. Petitioner appeared in the district court and argued, *inter alia*, that the Alabama courts had no jurisdiction to issue the injunction and subsequent damage judgments and that the injunction itself was invalid under the principles of *Donovan v. City of Dallas* and *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939). The district court denied these claims in a cursory, two paragraph opinion. It ruled, without discussion, that the Alabama injunction did not violate *Donovan*. The Fifth Circuit affirmed.

It was obvious that the *Allmon* complaint did not ask the federal court to assert in rem control or custody over the res, Empire Life Insurance Co. Thus on its face the Jefferson County court's injunction was invalid. It violated the well established rule of *Donovan* and *Princess Lida* that even a court that has already acquired in rem jurisdiction of a res may not lawfully bar other in personam actions, but may only prevent other actions in rem that seek possession of the property. All the Fifth Circuit could say was that *Allmon* "would interfere with and would have impeded if not thwarted" the receivership. (App. A, 4a) *Allmon* sought the purely in personam relief of a declaration of the unconstitutionality of new and untested Alabama insurance company receivership statutes; injunction against their further application by the receiver as against the *Allmon* class, and damages. This, the Fifth Circuit said, put the *Allmon* plaintiffs "in hostile competition with the Receiver" for Empire's assets. Even though the *Allmon* suit did not ask

the federal court to assume jurisdiction (custody) over the res, the Fifth Circuit held that the *Donovan-Princess Lida* exception for two in rem actions applied. (App. B, 7a)

REASONS FOR GRANTING THE WRIT

1.

Donovan holds that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," 377 U.S. at 413. The Fifth Circuit's decision creates an exception to that rule that swallows the rule itself.

Under *Donovan*, a federal plaintiff may not be deprived of the right to litigate in a separate *in personam* action his interests in property over which a state court has taken in rem jurisdiction.[3] Until now states have been powerless to preclude concurrent jurisdiction in such situations, whether by court injunction or by statutory provisions purporting to forbid federal litigation.[4] And

---

[3] *See, e.g.*, Markham v. Allen, 326 U.S. 490 (1946); Fischer v. American United Life Insurance Co., 314 U.S. 549 (1942); Pufahl v. Park , Estate, 299 U.S. 217, 226 (1936); Commonwealth Trust Co. of Pittsburth v. Bradford, 297 U.S. 613, 618-19 (1929); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); *cf.* Morris v. Jones, 329 U.S. 545, 550-52 (1947) (state court sitting in rem must recognize valid out of state judgment against receiver).

[4] *See, e.g.*, Monogram Industries, Inc. v. Zellen, 467 F. Supp. 122, 123 (D. Mass. 1979) (state statute conferring exclusive jurisdiction upon state probate court cannot preclude federal diversity claim against estate in probate); Mills v. Roanoke Ind. Loan & Thrift, 70 F.R.D. 448, 451 (W.D. Va. 1975) (state injunction forbidding suits against company in state receivership ineffective to stop federal court action); Slotkin v. Brookdale Hospital Center, 357 F. Supp. 705, 707-708 (S.D.N.Y. 1972) (two

[footnote continued]

the federal courts have not been loath to exercise their judicial power and fulfill their responsibilities as courts in a myriad of such situations.[5]

There is a single, limited qualification to the *Donovan* rule: a state court that has acquired custody over property may enjoin federal litigation that would require the federal court's officers (e.g., the United States Marshals) to take physical custody and control of the same property. 377 U.S. at 412. The exception had been stated in *Princess Lida of Thurn and Taxis v. Thompson*, which the *Donovan* Court cited:

> . . . it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the *two suits* are in rem, or quasi in rem, so that the court,

---

actions may proceed simultaneously where one is in rem and the other is in personam, despite existence of injunction forbidding second suit); Weisfeld v. Spartans Industries, Inc., 58 F.R.D. 570, 577 (S.D.N.Y. 1972) (state court may not enjoin federal suit to enjoin corporate reorganization in state court).

[5] *See, e.g.*, Dragstrem v. Obermeyer, 549 F.2d 20, 27 (7th Cir. 1977); Akin v. La. National Bank of Baton Rouge, 322 F.2d 749 (5th Cir. 1963) (heir may seek declaratory judgment as to right in will probated in state court); Koller v. Richmond Industrial Loan & Thrift, 407 F. Supp. 1211, 1212 (E.D. Va. 1975) (federal plaintiff may proceed in securities fraud action against insolvent company, its employees, and the receiver so long as judgment "does not conflict with [state] court's authority to decide questions relating to control of [the] property"); Joiner v. City of Dallas, 380 F. Supp. 754, 762 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042, *reh. denied*, 419 U.S. 1132 (1975) (federal plaintiff may challenge constitutionality of state eminent domain proceedings when only state determination remaining to be made is of amount to be paid for land).

> *or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause* and grant the relief sought the jurisdiction of the one court must yield to that of the other. (Emphasis added; footnote omitted).

General Atomic Co. v. Felter, 434 U.S. 12 (1977), made clear that the jurisdiction for this narrow qualification was no more than to prevent the situation of an unseemly tug-of-war between two courts seeking to assert physical control over the same res; *see Markham v. Allen*, 326 U.S. 490, 494 (1946). Injunctions may not issue even to forestall "vexatious and harassing litigation," *id.* at 16, much less merely to prevent federal courts from exercising concurrent subject matter jurisdiction or to prevent federal courts from adjudicating legal issues also involved in state proceedings. As the Court stated in *General Atomic*, the federal courts are "fully capable of preventing their [own] misuse for harassment." 434 U.S. at 19.

As if to drive the point home, on remand in *General Atomic* the lower court excluded from its injunction "all *in personam* actions in Federal Courts . . ." *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).[6]

Here the federal court litigation in which petitioner participated was unquestionably in personam. *Allmon* sought relief against individual state officials in their

---

[6]In the second *General Atomic* opinion the Court held that a writ of mandamus would issue to prevent the lower court from trying to extend its injunction to forbid arbitration proceedings under Federal law. General Atomic Co. v. Felter, 436 U.S. 493 (1978).

official capacity, claiming that they were acting unconstitutionally to deprive the plaintiff of civil rights personal to plaintiff. The federal court was not asked to assume for itself the physical control of the res, Empire Life, which the Jefferson County court had taken and then delegated to the Receiver; *cf. Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970). Furthermore, since *Allmon* was already pending when the Jefferson County court issued its injunction, that court's judgment against petitioner effectively enjoined continuation of a federal action already proceeding. The *Donovan* rule is, if anything, more strongly applicable in such a situation. *See General Atomic Co. v. Felter*, 434 U.S. at 17: "rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective."

The Fifth Circuit ignored *Donovan, Princess Lida, General Atomic* and the entire body of precedent (nn. 2, 3, 4 *supra*) confirming and implementing the rule of those decisions. It held that Alabama's Jefferson County court could properly enjoin and assess damages of a quarter million dollars against petitioner for violating an invalid injunction that purported to forbid petitioner from assisting federal court civil rights litigation, even though the federal court litigation did not seek federal court custody of the res. Its radical and clearly erroneous departure from the rule repeatedly announced and explained by this Court, if permitted to stand, will spawn confusion among the lower federal courts as to the vitality of the *Donovan* principles and will leave the state of the law in disarray. For that reason alone it demands review by this Court.

2.

The decision below creates a clear conflict in the application of the *Donovan* principles between the Fifth Circuit on the one hand and the Seventh Circuit, Fourth Circuit and Second Circuit on the other.

A.

The Seventh Circuit decision is *Central States, Southeast and Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Co.*, 600 F.2d 671 (7th Cir. 1979). There, as here, a state court had placed an insurance company in receivership. There, as here, the (Missouri) state court issued an injunction restraining all persons "from prosecuting or bringing any action, . . . against the [insurance company] . . . or its properties or assets, except pursuant to the order of this court." Like petitioner here, plaintiffs there then filed an amended complaint in a pending federal action against the insurance company. Plaintiffs there alleged (pursuant to the Employee Retirement Income Security Act of 1974) that the insurance company had participated in a conspiracy to defraud the pension fund of its assets.

Unlike the district court and Fifth Circuit here, however, the Seventh Circuit in *Central States* refused to recognize and enforce the Missouri state court's injunction:

> Old Security contends that, although technically in personam, this federal action has substantial in rem aspects.
>
> If this federal action was in rem, it would present a very different situation. *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976) involved state and federal proceedings, both in rem. . . .

> [T]he Fund's second amended complaint seeks to enforce a personal liability and obtain a money judgment, not to obtain possession of a res. Old Security describes injunction motions by the Fund as demanding in rem relief. Nothing of record indicates that the district court granted those months or any in rem relief. The district court is fully capable of preventing inappropriate conversion of the suit to a proceeding truly in rem.

600 F.2d at 675 n. 7.[7]

Central States could not conflict more squarely with this case. Here, contrary to the Seventh Circuit's holding, the Fifth Circuit held a state court injunction valid to prevent a federal in personam action even though it sought to enforce only "personal liability" and did not seek "to obtain possession of a res."

B.

While the question does not appear to have reached the Courts of Appeals for the Fourth and Second Circuits, decisions of district courts in those circuits are in square conflict with the Fifth Circuit here.

In *Mills v. Roanoke Ind. Loan & Thrift*, 70 F.R.D. 448, 451 (W.D. Va. 1975), a Virginia state court had

---

[7]The Seventh Circuit was affirming the district court there, which had held (in a passage the Seventh Circuit quoted, 600 F.2d at 674), that *Blackhawk Heating & Plumbing* was a situation where

> the Federal court should not simultaneously proceed with liquidation of the *res*, particularly when a domestic insurance company is involved. *However, when the Federal suit is proceeding in personam, we see no reason why we should not proceed simultaneously with the State court liquidation proceedings.* (emphasis added)

District courts in the Seventh Circuit of course follow *Central States. See, e.g.*, Tcherepnin v. Franz, 475 F. Supp. 92, 95-96 (N.D. Ill. 1979).

issued an injunction restraining "all persons from prosecuting suits" against a company in state receivership "without first obtaining permission of the court." Plaintiffs filed suit in federal court against former employees of the company, the company itself, and the receivers for a violation of the federal securities laws. Defendants asked the court to dismiss the case or abstain on the basis of the injunction. The District Court for the Eastern District of Virginia refused:

> . . . where one suit is *in rem*, as is the receivership proceeding in state court, and the other suit is *in personam*, it is equally well established that each court may exercise its concurrent jurisdiction independently of the other. . . . Under such circumstances, *the state court could not enjoin plaintiffs from asserting their federal causes of action.*

(citations omitted; emphasis added)

In *Slotkin v. Brookdale Hospital Center*, 357 F . Supp. 705, 707 (S.D.N.Y. 1972), a News York state court enjoined all actions against an insurance company in liquidation. Plaintiffs filed a federal diversity action based on fraud committed by the company and its former employees. Upon the liquidator's motion to dismiss the case because of the injunction, the district court held:

> This injunction would require our dismissal of the instant proceeding only if the state court requires exclusive jurisdiction to protect the *res*—the corporate assets. Thus, if two suits are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other in order "to avoid unseemly and disastrous conflicts in the administrating of dual judicial system . . ." *But two actions may proceed simultaneously where one is in rem and the other is in personam.*

(citation omitted; emphasis added)

C.

These three cases are in direct conflict with the Fifth Circuit's decision here. In each, a state court, proceeding in rem, had issued an injunction virtually identical to that of the Alabama court. The plaintiffs in the Seventh, Fourth and Second Circuits, like petitioner here in the Fifth Circuit, participated in federal court litigation which affected the state in rem proceedings and which violated the state court injunctions. The Seventh Circuit in *Central States*, a Fourth Circuit district court in *Mills* and a Second Circuit district court in *Slotkin* held the injunctions invalid; but the Fifth Circuit here upheld the injunction and approved enforcement of a quarter of a million dollar judgment against petitioner for violating it. This clear conflict within four federal circuits on an important issue can be resolved only by this Court's review.

3.

Petitioner is not a late-comer in seeking the Court's enforcement of the *Donovan* rule. Petitioner thrice sought certiorari to review the Alabama courts' injunction against in personam litigation in disregard of *Donovan*.[8]

---

[8]State ex rel. Payne v. Empire Life Ins. Co. of America (*Ex parte* Shearn Moody) 351 So.2d 538 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) (No. 77-1041, October Term 1977); Moody v. State ex rel. Payne, 351 So.2d 552 (Ala. 1977), *cert. denied*, 435 U.S. 969 (1978) (No. 77-1109, October Term 1977); Moody v. State ex rel. Payne, 355 So.2d 1116 (Ala. 1978), *cert. denied*, 439 U.S. 910 (1978) (No. 78-110, October Term 1978). The Fifth Circuit was explicit in its bias against petitioner because of his insistence on exercising his right to resort to the courts to protect his property interests, App. A, 4a-5a – a right protected by the First Amendment. *See In Re* Primus, 436 U.S. 412 (1978). Such bias of course does not justify the Fifth Circuit's impatient rush to be rid of petitioner without a reasoned explanation of its departure from Donovan.

The Fifth Circuit's willingness to enforce the invalid Alabama injunction takes this case out of the category of parochial, anomalous decisions of one of 51 state court systems. It means that the unequivocal *Donovan* rule that "state courts are completely without power to restrain federal court proceedings in *in personam* actions," is no longer the law in the largest federal judicial circuit. It means that state courts need no longer heed this Court's admonition in *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977), that "*Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings. . . . We nevertheless overturned the state-court injunction."

The Fifth Circuit's decision means that state courts anew may hope to encroach on federal courts' independence and supremacy in deciding their own jurisdiction in cases properly before them,[9] as state courts had attempted—and were stopped by this Court—a century ago.[10]

---

[9] *See* United States v. United Mine Workers of America, 330 U.S. 258, 290-292 (1947).

[10] *See, e.g.*, Railway Co. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); *see also* Terral v. Burke Construction Co., 257 U.S. 529 (1922).

CONCLUSION

This Court's review of the decision below is a necessity, to reaffirm the independence of the federal courts from state court interference; to ensure the lower federal courts' adherence to the principles of *Donovan*; to correct the Fifth Circuit's departure from those principles in conflict with other Circuits' strict adherence to them, and to prevent a federal court from unjustly lending its aid as a collection agency for the enforcement of an invalid decree in violation of a citizen's privilege to resort to the federal courts to redress violations of federally guaranteed rights.

Respectfully submitted,

WILLIAM A. DOBROVIR
(Attorney of Record)
FRED C. ZACHARIAS
DOBROVIR, OAKES & GEBHARDT
1025 Vermont Avenue, N.W.
Suite 1105
Washington, D.C. 20005
(202) 347-8118
Counsel for Petitioner.

APPENDIX

APPENDIX A

H. H. SUMRALL, Jr., Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

PROTECTIVE LIFE INSURANCE COMPANY,
a corporation, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

No. 79-1034.

United States Court of Appeals,
Fifth Circuit.

July 3, 1980.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, HENDERSON and SAM D. JOHNSON, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Shearn Moody appeals from final judgments entered in favor of Protective Life Insurance Company and the Receiver of Empire Life Insurance Company of America. The actions were brought by Protective and the Empire Receiver in federal district court to enforce Alabama damage judgments rendered against Moody. 28 U.S.C.A. §1738. We affirm.

Empire was placed in receivership by an Alabama state court. Moody intervened and was subsequently perma-

nently enjoined from any legal interference relating to the receivership proceeding. *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171 687 (Ala.Cir.Ct. Jan. 6, 1975). When Moody participated in the filing of an amended complaint in *Allmon v. Bookout*, No. 74-377N (M.D.Ala. Nov. 28, 1974) (amended complaint filed), *decided*, (M.D.Ala. April 24, 1975), *cuase vacated, dismissed, and remanded*, No. 75-2104 (5th Cir. Nov. 18, 1975), *cause dismissed*, (M.D.Ala. June 28, 1976), the Alabama state court, after an evidentiary hearing, held Moody in contempt. *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171-687 (Ala.Cir.Ct. April 30, 1975). Over Moody's vigorous challenges on the grounds of lack of personal service, *in personam* jurisdiction, subject matter jurisdiction, and a proper basis for damage assessment in a "civil action," the Alabama court awarded damages in favor of appellees, *State ex rel. Bookout v. Empire Life Ins. Co.*, No. 171-6878 (Ala.Cir.Ct. Oct. 19, 1976, Nov. 16, 1976), which were substantially affirmed on appeal. *Moody v. State ex rel. Payne*, 355 So.2d 1116, (Ala. 1978), *cert. denied, Moody v. Alabama ex rel. Payne*, 439 U.S. 910, 99 S.Ct. 279, 58 L.Ed.2d 256 (1978).

Protective and the Empire Receiver then filed diversity actions in federal district court to enforce the damage awards. 28 U.S.C.A. §1738. The District Court, again over Moody's caustic attack, granted the motions for summary judgment against him, enforcing the Alabama judgment awards. *Payne v. Moody*, No. G-78-69 (S.D.Tex. Nov. 15, 1978); *Protective Life Insurance v. Moody*, No. G-78-70 (S.D.Tex. Nov. 15, 1978).

Moody appeals, protesting several errors: the judgments (1) were rendered without adequate notice to Moody so violated due process, (2) denied his right to seek relief in federal courts in violation of the federal supremacy clause, (3) violated due process since the

contempt damage claims were not filed until after contempt liability was determined, (4) were penal in nature so not entitled to full faith and credit, (5) were not civil actions properly within the diversity jurisdiction of a federal district court so not entitled to full faith and credit, and (6) violated his Fifth Amendment privilege against self-incrimination since criminal contempt proceedings were pending against him. None of these claims withstands analysis.

Moody's due process claim of notice and jurisdiction over his person is easily discarded. The Supreme Court of Alabama in *Lightsey v. Kensington Mortgage & Finance Corp.*, 294 Ala. 281, 315 So.2d 431 (1975), made clear that at a violation of a valid restraining order contempt damages may be rendered in an action ancillary to—but still very much part of—the main proceeding. Here, the main proceeding, replete with sufficient proof of *in personam* jurisdiction over Moody, is the receivership proceeding. Moody may have been cagey in his initial participation—or lack of participation—at one or more of the contempt citations. Yet the evidence is abundant that Moody was informed of the contempt action constituting a part of the main receivership case in which he voluntarily entered the fray and became an inexhaustible combatant. The Alabama courts so held and we agree.

Moody also contests the denial of his right to seek relief in the federal courts. He claims this violates *Donovan v. Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), *followed in General Atomic Co. v. Felter,* 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977), *and Hanson v. Denckla,* 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). In *Donovan*, the Court refused to permit a state court to punish a federal court litigant for pursuing his remedies in an *in personam* action. However,

the Court specifically recognized the traditional exception to this rule for proceedings *in rem* or *quasi in rem*. The Court explained that for proceedings *in rem* or *quasi in rem* the state or federal court has custody of the jurisdiction-related property and retains exclusive jurisdiction over it. *Donovan v. Dallas*, 377 U.S. at 412, 84 S.Ct. at 1582, 12 L.Ed.2d at 413. Neither *General Atomic Co. v. Felter, supra,* nor *Hanson v. Denckla, supra,* is to the contrary. In this case, the state court restrained Moody from, and assessed damages for, his action which did and would interfere with the receivership proceeding. It cannot be disputed that a receivership action is one *in rem* or *quasi in rem*. The *Allmon* case had it succeeded, and would have impeded, if not thwarted, the entire receivership proceeding. Moody's conduct in the *Allmon* case attacked the very validity of the receivership, jurisdiction over which, under *Donovan*, rested safely and exclusively in the Alabama state courts.

Finally, particularly with regard to his remaining contentions, Moody is no stranger to the Courts. Judges have heard and considered his arguments over and again. Lawsuits which he has instigated have resulted in at least thirteen reported appellate opinions[1] and seven petitions

---

[1] *Moody v. State ex rel. Payne*, 355 So.2d 1116 (Ala. 1978); *Moody v. State ex rel. Payne*, 351 So.2d 552 (Ala. 1977); *Moody v. State ex rel. Payne*, 351 So.2d 547 (Ala. 1977); *Ex parte Moody*, 351 So.2d 538 (Ala. 1977); *Moody v. State ex rel. Payne*, 344 So.2d 160 (1977); *Moody v. State ex rel. Payne*, 295 Ala. 299, 329 So.2d 73 (1976); *Moody v. Texas*, 538 S.W.2d 158 (Tex.Civ.App. 1976, writ ref'd n. r. e. 1977); *Moody v. Moody Nat'l Bank*, 522 S.W.2d 710 (Tex.Civ.App. 1975, n. r. e.); *Moody v. Crook*, 520 S.W.2d 958 (Tex.Civ.App. 1975); *Moody v. State*, 520 S.W.2d 452 (Tex.Civ.App. 1975); *Moody v. Jones*, 519 S.W.2d 536 (Tex.Civ. App. 1975); *Empire Life Ins. Co. v. State*, 492 S.W.2d 366 (Tex.Civ.App. 1973); *Day v. State*, 489 S.W.2d 368 (Tex.Civ.App. 1972, n. r. e.).

for certiorari.[2] Indeed, by our computations, Moody's "case law" has been rendered and reviewed by no less than thirty-two members of the judiciary, not counting all nine Supreme Court Justices on petitions for both certiorari and rehearing. Here, we need only add our agreement with the Courts before us. Moody's protests before this Court, like their predecessors, are totally without merit.

AFFIRMED.

---

[2] *Ex parte Shearn Moody, cert. denied,* 434 U.S. 835, 98 S.Ct. 124, 54 L.Ed.2d 97, *rehearing denied,* 434 U.S. 976, 98 S.Ct. 537, 54 L.Ed.2d 469 (1977); *Moody v. Texas,* 539 S.W.2d 354 (Tex. Civ.App. 1976), *cert. denied,* 434 U.S. 985, 98 S.Ct. 612, 54 L.Ed.2d 479 (1977) *rehearing denied,* 434 U.S. 1042, 98 S.Ct. 786, 54 L.Ed.2d 793 (1978); *Moody v. Payne, cert. denied,* 434 U.S. 996, 98 S.Ct. 634, 54 L.Ed.2d 490 (1977), *rehearing denied,* 434 U.S. 1089, 98 S.Ct. 1288, 55 L.Ed.2d 796 (1978); *Moody v. Texas,* 538 S.W.2d 158 (Tex.Civ.App. 1976), *cert. denied,* 434 U.S. 1068, 98 S.Ct. 1248, 55 L.Ed.2d 770 (1978); *Moody v. Alabama ex rel. Payne,* 351 So.2d 552 (Ala. 1977), *cert. denied,* 435 U.S. 969, 96 S.Ct. 1609, 56 L.Ed.2d 60 (1978); *Ex parte Shearn Moody,* 351 So.2d 538 (Ala. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed.2d 60 (1978); *Moody v. Alabama ex rel. Payne,* 355 So.2d 1116 (Ala.), *cert. denied,* 439 U.S. 910, 99 S.Ct. 279, 58 L.Ed.2d 256 (1978).

APPENDIX B

H. H. SUMRALL, Jr., etc.,
Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

PROTECTIVE LIFE INSURANCE COMPANY,
a corporation, Plaintiff-Appellee,

v.

Shearn MOODY, Jr.,
Defendant-Appellant.

No. 79-1034.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1980.

Appeal from the United States District Court for the Southern District of Texas; Finis E. Cowan, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 3, 1980, 5 Cir., 620 F.2d 548)

Before BROWN, HENDERSON and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

On petition for Rehearing and Rehearing En Banc Moody asserts that our opinion "has expanded the *Donovan* [*v. Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409] exception to any case which affects a pending in rem proceeding rather than confining it to cases where the second action seeks jurisdiction or control over the same property or res. The authorities on

which the in rem exception are based limit its applicability to cases where two courts are competing for possession or control of the same property or res. See *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939); *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1935)."

Accepting this abbreviated statement we are convinced that the Federal Court *Allmon* suit did just that.

In that case the holder of an Empire Special Executive Plan insurance policy, sued Bookout,[1] individually and as Commissioner of Insurance for the state of Alabama, and as Receiver of Empire Life Insurance Company of America and also the Alabama Circuit Judge, the Special Assistant to the Judge, Protective Life Insurance Co. and five individuals.

In four counts covering the Sixty-seven paragraphs the pleading complained of fraud and illegal, unconstitutional action by the defendants in bringing about the receivership of Empire, the appointment of Bookout as Receiver and the subsequent liquidation of Empire by a reinsurrance agreement with Protective. The complaint also attacked the constitutionality of §§623, 631 and 634, Title 28A, Alabama Code, providing for a receivership and appointment of the Commissioner as Receiver as well as §748, Title 28A, Alabama Code.

But it was the prayer for relief which indelibly marked the real nature and purpose of the action.

Brought as it was against the appointed Receiver it requested the Court to declare unconstitutional §§623

---

[1]Succeeded by H. H. Sumrall now substituted by Tharpe Foresster, F.R.App.P. 43, as the current Commissioner and Receiver of Emoire.

at 631, Title 28A, Alabama Code on the basis of which the receivership was sought and the Receiver appointed. A declaration or injunction would have destroyed the receivership, and obviously, the Receiver's possession and control of all assets of Empire. The prayer sought injunction against the Receiver, the Circuit Judge (and others) enforcing, executing, administering or giving effect to §§623, 631.

The prayer also sought injunction restraining the Receiver (and others) from liquidating Empire, enforcing the reinsurance treaty with Protective, and as a climax, restraining the enforcement or carrying out of any order or judgment in case No. 171-687, *Alabama ex rel. Bookout v. Empire.* Heeding such injunction, if granted as sought, the receivership would have been terminated, and possession of all assets of Empire would have been taken away from the Receiver.

Added, as a clincher, the prayer expressly, in the *alternative* to such sweeping injunction order, sought money damages. Tested as it must be, by the nature and kind of relief which would be granted (or grantable) if the plaintiff were successful this suit was in hostile competition with the Receiver to wrest control and possession of Empire's assets and the Alabama orderly administration of the receivership out of the hands of the Receiver and Alabama Receivership Court.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 14, 1978

PROTECTIVE LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

SHEARN MOODY, JR.,

Defendant

CIVIL ACTION NO. G-78-70

CHARLES H. PAYNE, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America,

Plaintiff,

vs.

SHEARN MOODY, JR.,

Defendant

CIVIL ACTION NO. G-78-69

MEMORANDUM GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

The court's review of the pleadings and briefs persuades this court that the Alabama courts rendering the judgments upon which the above suits are predicated had jurisdiction of both the parties and the subject matter. The court is also persuaded that the Alabama State Court judgments do not violate the principles of *Donovan vs.*

City of Dallas, 377 U.S. 408 (1964) for the reason stated by the Supreme Court of Alabama in *Moody vs. State*, 329 So.2d 73, 81 (Alabama 1976).

If the conclusions of the foregoing paragraph are correct, this Court is obligated to give full faith to the Alabama judgments, 28 U.S.C., §1738, Art. 4, §1, U.S.C.A. Constitution.

Plaintiffs' motions for summary judgment will be granted. Counsel for the plaintiffs will prepare and submit appropriate orders.

Signed this 13th day of November, 1978.

/s/ Finis E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 15, 1978

PROTECTIVE LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

VS.

SHEARN MOODY, JR.,

Defendant.

CIVIL ACTION NO. G-78-70

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered by the Court herein on November 14, 1978, the Motion for Summary Judgment filed by Plaintiff, Protective Life Insurance Company, is due to be and is hereby granted. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Protective Life Insurance Company, a corporation, have and recover of Defendant, Shearn Moody, Jr., the sum of $184,838.33, being the principal amount of $165,228.50 together with interest in the amount of $19,609.83 (computed at the rate of six percent (6%) per annum from November 16, 1976, to November 8, 1978).

It is further ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant, Shearn Moody, Jr., be and the same is hereby denied, and that the Defendant, Shearn Moody, Jr., take nothing with respect to this case. Costs to be taxed against Defendant.

DONE, THIS 14th DAY OF NOVEMBER, 1978.

/s/ Finas E. Cowan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Filed Nov. 15, 1978

CHARLES H. PAYNE, Commissioner of Insurance of the State of Alabama, as Receiver for Empire Life Insurance Company of America,

Plaintiff,

VS.

SHEARN BOODY, JR.,

Defendant.

CIVIL ACTION NO. G-78-69

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered by the Court herein on November 14, 1978, the Motion for Summary Judgment filed by Plaintiff, Charles H. Payne, is due to be and hereby granted. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that Plaintiff, Charles H. Payne, Commissioner of Insurance and Receiver for Empire Life Insurance Company, have and recover of Defendant, Shearn Moody, Jr., the sum of $76,010.73, being the principal amount of $68,115.78 together with interest in the amount of $7,894.95 (computed at the rate of six percent (6%) per annum from December 3, 1976, to November 8, 1978).

It is further ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant, Shearn Moody, Jr., is due to be and is hereby denied, and that Defendant, Shearn Moody, Jr., take nothing with respect to this case. Costs to be taxed against Defendant.

DONE, THIS 14th DAY OF NOVEMBER, 1978.

/s/ Finas E. Cowan
United States District Judge